Supreme Court, U.S.
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CAPITAL CASE – NO DATE OF EXECUTION SET

No. 00-1742

IN THE

Supreme Court of the United States

Abu-Ali Abdur'Rahman,

Petitioner,

v.

Ricky Bell, Warden,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

The petition demonstrated that the district court's order vacating petitioner's death sentence and remanding for resentencing (the only such order ever entered by this district judge) would have been affirmed under the settled law of other circuits. Specifically, (i) petitioner's death sentence would not have been reinstated *sua sponte* on a ground that respondent abandoned without giving petitioner notice or an opportunity to be heard; (ii) given the strength of the district court's findings, petitioner would have been deemed prejudiced by his counsel's failure to introduce the "abundant" and "compelling" mitigation proof, and (iii) the instructions and juror form would have been found to suggest impermissibly that jurors must be unanimous in their determinations. Of note, respondent does not deny that the panel's central holding – that the death penalty should be reinstated because the jury would have imposed that sentence (regardless of the mitigating evidence) based on "the balance of aggravating and mitigating factors" (Pet. App. 20a) *without regard* to whether the evidence would "have influenced the jury's appraisal of [petitioner's] moral culpability" (*Williams* v. *Taylor*, 529 U.S. 362, 398 (2000)) – presents a conflict meriting review in this Court.[1] Certiorari accordingly should be granted.[2]

I. Certiorari Should Be Granted To Review The Panel Majority's Decision To Reinstate The Death Penalty Without Affording Notice Or An Opportunity To Be Heard.

1. There is no merit to respondent's argument (BIO 6-7) that, because the Sixth Circuit would have "reached the same legal conclusion had it relied solely on the state court record,"

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[1] Respondent's suggestion that the decision below rests only on the majority's *sub rosa* view of the facts is incorrect: the decision, however cursory, turns on legal propositions that conflict with decisions of this Court and other circuits. It is moreover settled that "appellate courts [do not possess] the kind of open-ended discretion which was held invalid in *Furman* v. *Georgia*, 408 U.S. 238 (1972)." *Maynard* v. *Cartwright*, 486 U.S. 356, 362 (1988).

[2] The BIO's statement of facts rests largely on self-serving statements by petitioner's co-defendant, who has admitted that petitioner did *not* give him a weapon (T 1523, 1527) or intend to kill the witnesses (F Ex 93, at 25).

no circuit conflict relating to waiver is presented by this case. Respondent's argument rests on his view that the district court was *per se* forbidden to hold an evidentiary hearing, which the Sixth Circuit properly rejected in accordance with this Court's precedents. See Pet. App. 5a-16a (citing, *inter alia*, *Keeney* v. *Tamayo-Reyes*, 504 U.S. 1 (1992); *Townsend* v. *Sain*, 372 U.S. 293 (1963)). Nor was the evidence found by the federal district court cumulative of that before the state courts: twenty-one witnesses – none of whom testified before the jury, and only six of whom testified in the state post-conviction proceedings – testified regarding an array of mitigating factors, see App., *infra*, that respondent has never attempted to rebut.

2. Respondent next mistakenly contends (BIO 7) that the petition asserted a conflict between the decision below and Sixth Circuit precedent. In reality, petitioner's position is that, on either of two independent grounds, other circuits would not have considered the prejudice question without at least providing notice and an opportunity to be heard, given respondent's abandonment of the issue on appeal. First, several circuits have held that states, like habeas petitioners, are deemed to waive arguments abandoned on appeal. See Pet. 9. As Judge Posner has stated, on habeas, "if the state waives its best arguments it must live with the consequences." *Rivera* v. *Director, Dep't of Corrections*, 915 F.2d 280, 283 (CA7 1990). Second, other circuits have held that, even in the non-capital context, habeas petitioners must be given notice and an opportunity to be heard before their claims are *sua sponte* dismissed. See Pet. 10-11. Thus, even if those courts would have addressed whether the federal court record demonstrated prejudice, they would at least have given petitioner's counsel the chance to argue the issue. Respondent's claim that these decisions merely "reflect the exercise of the courts' discretion" (BIO 8) disregards that the courts adopted firm rules based on basic constitutional protections.

3. Respondent's argument (BIO 7) that the Sixth Circuit *implicitly* applied a "miscarriage of justice" exception to the waiver principle is sheer speculation.[3] In any event, this argument only

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[3] The Sixth Circuit majority more likely applied the one-sided waiver approach of the Eighth Circuit. See Pet. 8-9. Not only did the Sixth Circuit find

buttresses the petition's showing of a circuit conflict – because application of that exception would conflict with the firm rule of other circuits just described – and furthermore demonstrates that the panel majority's approach to imposing the death penalty has so defied basic legal principles as to require this Court's intervention. First, respondent's argument that the federal court record "clearly did not support a finding of prejudice" (*id.*) is belied by respondent's actions on appeal: the federal court record so convincingly demonstrated prejudice that respondent declined to appeal on that ground. Second, no "miscarriage of justice" could arise from the district court's order that petitioner be resentenced based on the evidence that constitutionally adequate counsel would have introduced at the original trial. Moreover, the Sixth Circuit *sua sponte* reinstated petitioner's execution – in rulings that respondent notably fails to defend (Pet. 20-21 n.12) – based on the erroneous holding that *petitioner* waived arguments (reliance on the federal court record in challenging the HAC aggravator and the unanimity requirement of the jury instructions). The Sixth Circuit majority and respondent therefore presumably believe that there is no "miscarriage of justice" if petitioner is executed in violation of the Constitution. This Court cannot leave unreviewed such an uneven application of the law when an individual's life hangs in the balance.

4. The decision below also conflicts with this Court's precedents. Although a court may decide an issue *sua sponte* in the non-capital context (*e.g.*, *United States* v. *Karo*, 468 U.S. 705 (1984), *cited in* BIO 8-9), it is settled that a capital defendant is entitled to address the factors that may form the basis for imposing the death penalty. In *Lankford* v. *Idaho*, 500 U.S. 110 (1991), the trial court (like the Sixth Circuit here) imposed a death sentence based on its calculus of aggravating and mitigat-

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waivers by petitioner, but it has never invoked the "miscarriage of justice" exception against a criminal defendant or when a party had abandoned the issue on appeal. Furthermore, the Sixth Circuit apparently has applied the exception without briefing or argument in only two published decisions, neither relevant to the prejudice determination in this case: *Zhislin* v. *Reno*, 195 F.3d 810 (1999) (simply invoking an intervening, controlling decision of this Court); *Dorris* v. *Absher*, 179 F.3d 420, 426 (1999) (emphasizing that the issue was a "pure question of law, with no material facts in dispute").

ing factors not raised by the state and therefore not addressed by the defendant's counsel. This Court overturned the death sentence not because the trial court's conduct "compromised the adversarial process essential to the truth seeking function of a *trial* and, by close analogy, of a *capital sentencing proceeding*" (BIO 9), but because "inadequate notice concerning the character of the hearing frustrated counsel's opportunity to make an argument that might have persuaded the trial judge to impose a different sentence, or at least to make different findings than those he made" (*Lankford*, 500 U.S. at 124). That is precisely what happened in this case, notwithstanding respondent's claim that "obviously" petitioner "was on notice that the court of appeals might well take into account the evidence at the federal evidentiary hearing" because "the district court had relied on that evidence almost exclusively" (BIO 8): respondent consciously abandoned the prejudice argument later adopted by the Sixth Circuit and acquiesced when petitioner's counsel pointed out the abandonment. See Pet. 6; Br. of *Amici* Law Profs. 2-3.

II. Certiorari Should Be Granted To Review The Panel Majority's Prejudice Analysis.

As respondent acknowledges (BIO 9-10), the panel majority reinstated petitioner's death sentence because it concluded that "aspects" of the mitigation proof "also contained harmful information." Pet. App. 20a. As typified by decisions of the Fifth, Eighth, Seventh, and Eleventh Circuits finding prejudice on facts indistinguishable in any material respect (see Pet. 14-17), the panel's decision gives rise to *six* different conflicts with precedents of this Court and other circuits meriting certiorari. (The petition (at 17) mistakenly cites *Pickens* v. *Lockhart*, 714 F.2d 1455, 1467 (CA8 1983), as a decision of the Fifth Circuit.)[4] Nor can respondent fairly treat these conflicts atomistically, for

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[4] Respondent says only (BIO 10) that the cases discussed in the petition establish no *per se* rule regarding the treatment of supposedly "negative" evidence. The petition did not claim otherwise. Rather, it detailed (at 14-17) why the facts of this case cannot be distinguished from the facts before those four circuits, and furthermore demonstrated that other circuits apply legal propositions which conflict with the decision below (see also *infra* at 5-9).

in combination the district court's finding of prejudice plainly would be sustained under the law of other circuits.

A. The Jurors' View Of Petitioner's Moral Culpability.

Respondent does not dispute that, although the district court found prejudice based on its recognition that "'defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable'" (Pet. App. 87a (quoting *Penry* v. *Lynaugh*, 492 U.S. 302, 319 (1989)), the panel majority's contrary holding that petitioner was not prejudiced rests exclusively on its view of how the trial jury might have viewed "the balance of aggravating and mitigating factors" (Pet. App. 20a). The petition argued (at 17-19) that this Court approved of the district court's approach, holding that the proper prejudice inquiry must encompass whether mitigation evidence would "have influenced the jury's appraisal of [the defendant's] moral culpability." *Williams* v. *Taylor*, 529 U.S. 362, 398 (2000). Prejudice thus may exist "even if [the evidence] does not undermine or rebut the prosecution's death-eligibility case." *Id.* See also Supp. Br. Pet'r 1-4.

There indisputably is a circuit conflict meriting certiorari on the proper test for finding prejudice. Respondent argues only (BIO 12) that the court of appeals was right to ignore whether the mitigation proof would have affected the jury's sense of petitioner's moral culpability: "the language in *Williams* seized upon by petitioner pertains only to the reweighing of aggravating and mitigating circumstances by a state court – not the prejudice analysis performed by the court of appeals on collateral review in this case." Respondent thus does not dispute that other circuits on federal habeas *do* find prejudice if the mitigation evidence could have led jurors to believe that the defendant was not sufficiently morally culpable for his crime to be sentenced to death. See Pet. 14-17 (citing *Lockett* v. *Anderson*, 230 F.3d 695, 716 (CA5 2000) ("less morally culpable"); *Emerson* v. *Gramley*, 91 F.3d 898, 907 (CA7 1996) (per Posner, J.) ("reduce[d] * * * moral responsibility"), *cert. denied*, 520 U.S. 1122, 1139 (1997); *Harris* v. *Dugger*, 874 F.2d 756, 764 (CA11) ("less reprehensible"), *cert. denied*, 493 U.S. 1011 (1989)).

This conflict is, moreover, outcome determinative because the six classes of mitigation evidence would have profoundly affected the jurors' sense of petitioner's moral culpability. Respondent *does not contest* that fact here, just as he did not contest it in the court of appeals; even the panel majority did not doubt that it was true. The jurors were not provided with the available, compelling evidence that petitioner had been the victim of shocking abuse, suffered from serious mental illness, and had made substantial contributions to society, or with critical mitigating evidence regarding the prior homicide that constituted the principal aggravator supporting the death penalty. See Pet. 12-14; *e.g.*, Pet. App. 89a (district court opinion recounting how "[p]etitioner's father made him take off his clothes, placed him hog-tied in a locked closet, and tethered him to a hook with a piece of leather tied around his penis" and "struck Petitioner's penis with a baseball bat" (record citations omitted)); see also *Amici* Mental Health & Soc. Worker Orgs. Br. 4-6 & n.2. Both the affidavits of the trial jurors and empirical data definitively confirm that petitioner would not have been sentenced to death if competent counsel had presented this evidence. See *id.* App. 1a-8a; *Amicus* Cornell Death Pen. Proj. Br. 10.[5]

B. The "Totality" of The Mitigation Proof.

Contrary to *Williams* v. *Taylor*, the panel majority did not consider the "totality" of the mitigation evidence. The majority's statement that it found no prejudice "[e]ven considering the supplemental evidence heard by the district court and outlined in

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[5] There also is no support for respondent's contention (BIO 12) that an inquiry into the defendant's "moral culpability" is required in state court but not appropriate on federal habeas. At least in pre-AEDPA cases like this one, this Court has consistently applied the same prejudice analysis under *Strickland* v. *Washington*, 466 U.S. 668 (1984), in cases arising on federal habeas as in cases arising from state courts. *E.g.*, *Glover* v. *United States*, 531 U.S. 198 (2001); *Roe* v. *Flores-Ortega*, 528 U.S. 470 (2000); *Smith* v. *Robbins*, 528 U.S. 259 (2000). Given that *Williams* simply explicates the *Strickland* inquiry (see 529 U.S. at 391) – *i.e.*, *Williams* recognizes that jurors consider a defendant's moral culpability in determining whether to sentence him to death – its reasoning applies fully on federal habeas. This point also disposes of respondent's argument (BIO 12) that the Sixth Circuit, unlike a state court, was not required to consider the "totality" of the mitigation evidence.

its opinion" (Pet. App. 20a, *quoted in* BIO 6), reflects only its rejection of respondent's argument that the district court was not permitted to compile an evidentiary record. See Pet. App. 5a-16a. In any event, because the majority opinion does not mention *any* of the mitigation evidence found by the district court (compare *id.* 20a with *id.* 88a-98a), respondent could at best hope to assert that the panel majority *sub rosa* deemed those six classes of mitigation evidence to be wholly unpersuasive. Such a decision conflicts with the extensive authority in other circuits compiled in the petition (see Pet. App. 157a-159a) finding prejudice on far less compelling facts.

C. Erroneous Reliance On The HAC Aggravator.

The petition established that the panel majority erroneously relied on the HAC aggravator. Subsequent to the state court decisions on which respondent relies (BIO 14), the Sixth Circuit held (based on this Court's precedents) that the HAC aggravator is unconstitutionally vague unless the *jury* makes a narrowing finding that the killing involved torture, as opposed to the vaguer "depravity of mind." *Coe* v. *Bell*, 161 F.3d 320, 335-36 (CA6 1998), *cert. denied*, 528 U.S. 842 (1999) (citing *Richmond* v. *Lewis*, 506 U.S. 40 (1992); *Shell* v. *Mississippi*, 498 U.S. 1 (1990) (per curiam); *Maynard* v. *Cartwright*, 486 U.S. 356 (1988)); *Houston* v. *Dutton*, 50 F.3d 381 (CA6), *cert. denied*, 516 U.S. 905 (1995). See also Pet. 21-22 (describing conflict with Tenth Circuit's treatment of HAC aggravator).

The jurors made no such finding in this case, rendering irrelevant respondent's strained contention (BIO 14) that the state appellate courts implicitly employed a limiting construction. The panel majority then relied on the aggravator, invoking "the balance of aggravating and mitigating factors" used in the trial court (Pet. App. 20a), and Judge Batchelder's concurrence *expressly* relied on the "aggravating circumstances *including the heinousness* of the killing" (Pet. App. 38a (emphasis added)).[6]

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[6] The decision below thus also conflicts with the rule that, in a weighing state such as Tennessee, "special emphasis" must be given "to the requirement that aggravating factors be defined with some degree of precision." This Court accordingly has "require[d] close appellate scrutiny of the import and effect of

D. Treatment of So-Called "Harmful" Evidence.

The petition established that the evidence characterized by the panel majority as "harmful" was properly treated as mitigating under *Williams* v. *Taylor*, 529 U.S. 362, 398 (2000), because it would have been presented through expert testimony "consistent with" a portrait of petitioner as less morally responsible for his actions. Petitioner is arguing not for a "per se rule" but that the evidence in this case is on all fours with – indeed, compares favorably to – the evidence in *Williams*. Respondent does not defend the panel majority's critical conclusion (Pet. App. 20a) that the jurors would have been more likely to sentence petitioner to death had they known that the prior homicide underlying imposition of the death penalty was his uncontrollable reaction to being repeatedly raped by a gang led by the victim. See Pet. 13-14, 22. Respondent's attempt to explicate what the panel majority mischaracterized as "a history of violent character traits" (Pet. App. 20a) fares no better: this evidence – describing a few minor incidents (none of which resulted in serious injury) more than *a decade* before the homicide at issue in this case, and the fact that petitioner went AWOL from the military – does not undermine the mitigation proof that the district court found would have been compelling to the jurors. See generally *Amicus* Cornell Death Pen. Proj. Br.[7]

E. Failure to Account for the Views of a Single Juror.

In *Williams* v. *Taylor*, this Court agreed to resolve, but ultimately did not reach, whether a less stringent standard for prov-

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aggravating factors to implement the well-established Eighth Amendment requirement of individualized sentencing determinations in death penalty cases." *Stringer* v. *Black*, 503 U.S. 222, 230 (1992).

[7] Furthermore, this evidence was inadmissible under the holding of *Carter* v. *Bell*, 218 F.2d 581, 589 (CA6 2000), that the state may introduce only evidence relevant to a particular aggravating or mitigating circumstance. Decisions that pre-date *Carter* and, in any event, never expressly disagreed with *Carter*'s holding are therefore irrelevant. None of the evidence cited by respondent would have proved any of the three aggravators invoked by the state or rebutted petitioner's case in mitigation. And although respondent asserts (*id.*) that the evidence was not "cumulative," Judge Cole's dissent properly explained that the jurors already had heard much of it (Pet. App. 45a).

ing prejudice applies when (as in Tennessee) a single juror could have held out for a life sentence. The district court embraced the relaxed single-juror standard applied by most circuits that have addressed the question. See Pet. 24-25; Pet. App. 96a. Respondent does not deny that the issue merits certiorari, but asserts (BIO 16-17) that it is not presented here because the Sixth Circuit neither "adopted [n]or rejected petitioner's argument." But as the petition explained, the panel majority agreed that the "supplemental evidence contains mitigating evidence that *a sentencer* might find to be compelling," and found no prejudice based only on its view of the effect of the evidence on "the sentencing jury." Pet. App. 20a, 19a. Even if the panel's opinion only ignored – rather than rejected – the proposition that the single-juror standard was appropriate, certiorari would still be warranted because the Sixth Circuit's failure to apply the single-juror standard conflicts with the settled law of other circuits.

F. The Absence of Mitigating Evidence at Trial.

Respondent does not dispute that when trial counsel fails to present mitigating evidence, prejudice is exceedingly likely to be found because jurors were provided with no reason to spare the defendant's life. See Pet. 25-26. Respondent maintains only (BIO 17) that there was mitigation evidence in this case. But the meager plea of petitioner and his wife for his life was neither a "strategy" (as respondent does not dispute that petitioner's counsel was constitutionally ineffective) nor involved the presentation of any mitigating "evidence." The district court correctly found that the specific testimony invoked by respondent was "breathtakingly brief in content, and lacking in quality, and quantity" (Pet. App. 94) and that (as the Sixth Circuit majority emphasized and invoked against petitioner) "'[t]his is a case of *no mitigating evidence—none*—being offered to the jury despite its availability and abundance'" (*id.* 24a (emphasis added)). Because a heightened prejudice inquiry would have been applied under the settled law of other circuits, certiorari is warranted.

III. Certiorari Should Be Granted On The Unanimity Issue.

Respondent only emphasizes the conflict between the decision below and the holding of *Kubat* v. *Thieret*, 867 F.2d 351 (CA7), *cert. denied*, 493 U.S. 874 (1989), that jury instructions

may not suggest that jurors must be unanimous in their weighing of aggravating and mitigating circumstances. See BIO 12 (emphasizing that Sixth Circuit required unanimity in weighing). Such an instruction, the Seventh Circuit held, creates the risk that if "one juror thought that the death penalty should not be imposed, he or she might have submitted to the views of the other eleven because of the mistaken belief that unanimity was required" as to the balance of aggravating and mitigating circumstances. 867 F.2d at 371. Under Seventh Circuit precedent, petitioner's death sentence would thus have been invalidated.[8]

This case also squarely presents the distinct circuit conflict over whether jury instructions and forms announcing the unanimity requirement in close proximity to the discussion of mitigating circumstances impermissibly suggest that jurors must be unanimous as to each mitigator. See Pet. 26-30. Respondent notes (BIO 21) that the instructions in *Frey* v. *Fulcomer*, 132 F.3d 916 (CA3 1997), *cert. denied*, 524 U.S. 911 (1998), "suggest[ed] the need for juror unanimity," but ignores that the same was true in this case, leading Tennessee later to amend its pattern instructions. Of particular note, respondent ignores entirely that the "Punishment of Death" verdict form required the jurors to certify that "[w]e, the jury, *unanimously find* that there are *no mitigating circumstances* sufficiently substantial to outweigh the statutory aggravating circumstance or circumstances so listed above." Pet. App. 161a (emphasis added). It is difficult to imagine a more explicit requirement of unanimity.

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[8] The excerpt of the *Kubat* instruction invoked by respondent suggests not that jurors must find a mitigating circumstance unanimously but rather that – like the instruction in this case – jurors must be unanimous as to the weighing of mitigating and aggravating circumstances. BIO 21 (quoting instruction directing jurors to select non-capital sentence if "you unanimously conclude that there is a sufficiently mitigating factor or factors to preclude imposition of the death sentence").

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

Mitigation Witnesses In Order Of Appearance

A. Petitioner's Witnesses

1. T 10-81 - Dr. Kris Sperry, Chief Medical Examiner of the State of Georgia, who upon evaluation of blood lab evidence, crime scene photographs, and the victim's autopsy report, concluded that petitioner did not have blood on his clothes from the crime scene and, therefore, given the total circumstances, could not have been the assailant.

2. T 179-268 - Neal McAlpin, petitioner's trial counsel, who testified to the influence that the Southeastern Gospel Ministry ("SEGM") had over petitioner and the involvement that it had in the commission of the offense, as well as to petitioner's good character traits.

3. T 271-432 - Lionel Barrett, petitioner's trial counsel, who admitted to his failure to investigate or present any mitigating evidence and to calling to testify two unprepared witnesses, who offered no substantive mitigating evidence.

4. T 439-600 - Dr. Robert Sadoff, nationally renowned psychiatrist, who diagnosed petitioner with borderline personality disorder and post-traumatic stress disorder, and concluded that, given his psychological history, vulnerability, and all known evidence, he dissociated at the time of the offense and was, therefore, legally insane under Tennessee law, and had no independent recollection of the actual assault, whether or not he was the assailant.

5. T 613-663 - Dr. Diana McCoy, neuropsychologist and petitioner's social historian, who summarized the history of abuse, neglect, deprivation, and mental illness that petitioner endured, *see* Social History Ex. 141, and who also agreed with Dr. Sadoff's diagnosis.

6. T 689-769 - Sumter Camp, attorney who assisted Barrett at trial and who testified consistent with Barrett concerning their failures to investigate or present mitigating evidence.

7. T 786-842 - Nancy Lancaster, petitioner's half-sister, who testified about petitioner's childhood and that of his siblings, including a history of the most extreme abuse, neglect, and deprivation inflicted by their parents.

8. T 858-894 - Richard Dinkins, post-conviction counsel, who testified concerning the state post-conviction trial court's bias and its refusal to provide resources necessary to retain essential investigative and expert resources or to secure the appearance of witnesses in order to demonstrate the abundant unpresented mitigation proof that had been available for presentation at trial.

9. T 899-1022 - John Zimmermann, Assistant District Attorney and petitioner's trial prosecutor, who acknowledged the existence at the time of trial in his possession of documentary evidence of specific mitigation evidence on behalf of petitioner, which he did not reveal to petitioner or his trial counsel.

10. T 1025-1053 - Ross Alderman, counsel for co-defendant Devalle Miller, who testified to evidence that was exculpatory and mitigating to petitioner with regard to his culpability and involvement in the commission of the offense.

11. T 1054-1156 - Bryan Stevenson, nationally renowned, experienced, and exceptionally qualified capital defense attorney expert, who testified in federal court about the extreme nature of trial counsel's failures and the proof that "is some of the strongest mitigation that I have seen," T 1123.

12. T 1181-1213 - Sarah Walton Roberts, petitioner's former fiancée, Quaker, attorney, and then-current employee of the Maine Attorney General's office, who testified regarding petitioner's good character, altruistic motives, good works, and the mitigating nature of his personal and intimate relationship with her.

13. T 1215-1267 - Susie Bynum Jones, petitioner's wife, who testified concerning petitioner's good character, the influence on petitioner of the SEGM, and petitioner's mental state mitigation evidence.

14. T 1275-1294 - Gail Hughes Mann, petitioner's friend, who testified as to her positive relationship with him.

15. T 1307-1342 - Dr. Ray Winbush, psychologist, Director of the Race Relations Institute and Professor at Fisk University, who testified as to the extreme nature of the abuse and neglect endured by petitioner – *e.g.*, "It is singularly the worst case of abuse I have come across in 25 years," T 1315.

16. Evidentiary deposition, Ex. 135 - Elmer Bishop, a correctional supervisor at the federal reformatory where petitioner was in custody in 1972, who confirmed the exculpatory, mitigating version of the 1972 aggravating homicide as a defensive act by petitioner to prevent his homosexual rape, as opposed to the erroneous account put forth by the prosecution in the state trial that it was a killing committed during the course of a drug turf war between competing prison gangs. In fact, Elmer Bishop described petitioner as a victim of "sexual predators."

17. Evidentiary deposition, Ex. 136 - FBI Special Agent, William Delagrange, who investigated the 1972 offense and corroborated the mitigating account of the 1972 offense, consistent with Officer Elmer Bishop's version.

18. Evidentiary deposition, Ex. 148 - Allen Boyd, petitioner's employer at the Baptist Publishing Board (BPB), petitioner's mentor at the SEGM, an accomplice before and after the commission of the instant offense, and source of the attorney's fee for petitioner's trial attorney, who, by refusing to answer questions on the ground that it might incriminate him, supported petitioner's account of the exculpatory and mitigating influence of the SEGM in the commission of the offense.

19. Evidentiary deposition, Ex. 149 - William Beard, another principal of SEGM, whose role as accomplice and mentor was established through other sources, such as petitioner's initial counsel, Neal McAlpin, and who also refused to answer questions on the basis of the Fifth Amendment.

20. Evidentiary deposition, Ex. 152 - Richard Bretzlauf, petitioner's employer in Chicago immediately before his move to Nashville, as to mitigating evidence of petitioner's good character and industry.

B. Respondent's witnesses:

1. T 439-613 - Dr. Samuel Craddock, a psychologist from Middle Tennessee Mental Health Institute (MTMHI), who performed the court-ordered evaluation at trial (but did not testify at trial) and who did not dispute the diagnosis of petitioner found by Dr. Robert Sadoff and Dr. Diana McCoy.